

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY)
AVERAGE WHOLESale PRICE)
LITIGATION)
_____)

THIS DOCUMENT RELATES TO:

United States of America ex rel. Ven-a-Care of)
the Florida Keys, Inc. v. Abbott Laboratories,)
Inc., Civil Action No. 06-11337)

MDL No. 1456
Civil Action No. 01-12257-PBS
Subcategory No. 06-11337-PBS

United States of America ex rel. Ven-a-Care of)
the Florida Keys, Inc. v. Dey LP, et al., C.A.)
No. 05-11084)

Hon. Patti B. Saris

United States of America ex rel. Ven-a-Care of)
the Florida Keys, Inc. v. Boehringer)
Ingelheim Corp., et al., Civil Action No. 07-)
10248-PBS)

JOINT MOTION FOR ENTRY OF ADDITIONAL BRIEFING SCHEDULE

Plaintiffs, United States and Ven-A-Care of the Florida Keys, Inc., and Defendants
Boehringer Ingelheim Corporation ("BIC"), Boehringer Ingelheim Pharmaceuticals, Inc.
("BIPI"), Roxane Laboratories, Inc., and Roxane Laboratories, Inc., n/k/a Boehringer Ingelheim
Roxane, Inc. (collectively, "Roxane/BI"), Dey, Inc., Dey L.P., Inc., and Dey L.P. (collectively
"Dey"), and Abbott Laboratories, Inc. ("Abbott") jointly propose the following additional
briefing schedule.¹

On or after June 26, 2009, in addition to filing their Summary Judgment briefings, the

¹The parties previously filed a Joint Motion to Establish Briefing Schedule for Summary
Judgment Motions, Master Docket ("M.D.") # 6170, which has not been ruled on.

Defendants each filed a motion to dismiss and supporting memorandum (for Abbott: M.D. 6179 & 6183; for Roxane/BI: M.D. 6196 & 6197; for Dey: M.D. 6206 & 6209), seeking dismissal of Plaintiffs' complaints for want of subject matter jurisdiction based on the public disclosure/original source rule of 31 U.S.C. § 3730(e)(4) of the False Claims Act ("FCA"). In addition, in their memoranda in support of their summary judgment motions, the Defendants also make arguments that they assert are impacted by the outcome of their motions to dismiss. *See* Roxane/BI Motion (M.D. 6199) for Summary Judgment and supporting memorandum ("Roxane/BI SJ Memo") (M.D. 6200) at 35-37; Abbott Partial Motion (M.D. 6185) for Summary Judgment and supporting memorandum ("Abbott SJ Memo") (M.D. 6186) at 39-40; and, Dey Partial Motion (M.D. 6178) for Summary Judgment and supporting memorandum ("Dey SJ Memo") (M.D. 6194) at 39-40.

Abbott also filed a separate motion in limine ("Abbott *Daubert* Motion") and 30-page supporting memorandum (M.D. 6177) challenging the United States' damages expert based upon *Daubert* grounds, which Abbott also discusses in Section I.B, pp. 16-19, of the Abbott SJ Memo.

BIC and BIPI also filed a separate motion for summary judgment (BIC/BIPI SJ Motion) (M.D. 6191) and a 20-page memorandum in support of the motion (M.D. 6192).

In its SJ Memo, at p. 33 n.17, Dey states, "Dey hereby incorporates the Joint Defendants' Motion for Summary Judgment on the FUL Claims in the New York Counties Actions." Additionally, Dey's Statement of Undisputed Facts (Dey SOF ¶ 249) (D.E. 6190) in support of Dey's SJ Motion also states that Dey incorporates by reference certain record support and factual material from the same New York Counties case.

Plaintiffs and Defendants are in disagreement concerning the propriety of certain filings.

In conference held pursuant to LR 7.1(A)(2), the parties agreed to the following schedule to resolve their differences without motion practice.

1. Further proceedings on the Defendants' motions to dismiss and supporting memoranda (Abbott, M.D. 6179 & 6183; Roxane M.D. 6196 & 6197; Dey M.D. 6206 & 6209), and Plaintiffs' responses to those sections of Defendants' summary judgment memoranda related to each Defendant's motion to dismiss (Roxane/BI SJ Memo at 35-37; Abbott SJ Memo at 39-40; and, Dey SJ Memo at 39-40) shall be deferred until after the conclusion of the parties' summary judgment briefing, as follows:

Oppositions due:	October 19, 2009
Replies due:	November 2, 2009
Surreplies due:	November 16, 2009

2. Briefing on Abbott's *Daubert* Motion (M.D. 6175) and supporting memorandum (M.D. 6177), and any portion of Abbott's SJ Memo that pertains or refers to the Abbott's *Daubert* Motion, shall be deferred until after the conclusion of the parties' summary judgment briefing, as follows:

Opposition due:	October 19, 2009
Reply due:	November 2, 2009
Surreply due:	November 16, 2009

3. With respect to the BIC/BIPI SJ Motion, the Plaintiffs and BIC and BIPI agree that the briefing on this motion shall be deferred as follows:

Opposition due:	August 28, 2009
Reply due:	September 15, 2009

Surreply due: September 22, 2009

4. With respect to Dey's incorporation of the New York Counties briefing into the Dey SJ Memo and related Dey SOF ¶249, Dey agreed to withdraw footnote 17 of the Dey SJ Memo, and the Plaintiffs need not respond to that footnote or to any reference by Dey to the New York Counties briefings. In addition, Dey hereby withdraws paragraph 249 of its Statement of Undisputed Facts (M.D. 6190), and the Plaintiffs and Dey agree that Plaintiffs need not respond to Dey SOF ¶ 249.

As to hearing dates, the parties previously agreed on and suggested that the Court set two days in late October for argument on the summary judgment motions. Joint Motion to Establish Briefing Schedule for Summary Judgment Motions (M.D. 6170), at 2. Plaintiffs and Defendants differ as to whether the previously-requested date remains appropriate.

Plaintiffs assert that the Court should go forward in late October as the parties requested with a hearing on the issues that have been fully briefed for summary judgment, including argument on the BIC/BIPI SJ Motion, and defer until after November 16, 2009, argument on the motions to dismiss and Abbott's *Daubert* Motion, as well as those related portions of Defendants' summary judgment memoranda outlined herein, when those issues are fully briefed.

Defendants assert that certain arguments in their summary judgment motions will be impacted by the outcome of their motions to dismiss and that argument on the motions for summary judgment should therefore be deferred until the motions to dismiss are fully briefed and can be argued together. Similarly, Abbott believes that certain arguments in its motion for summary judgment will be impacted by the outcome of its *Daubert* Motion and that argument on

the *Daubert* Motion should occur at the same time as argument on the motion for summary judgment.

WHEREFORE the parties ask that the Court enter the briefing schedule above for the non-summary judgment motions filed on June 26, 27 and 29 and the BIC/BIPI SJ Motion, and also at the same time schedule hearing date(s) as the Court deems appropriate.

Dated: July 7, 2009

Respectfully submitted,

For the United States of America,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused an electronic copy of the above **JOINT MOTION FOR ENTRY OF ADDITIONAL BRIEFING SCHEDULE** to be served on all counsel of record via electronic service pursuant to Paragraph 11 of Case Management Order No. 2 by sending a copy to LexisNexis File & Serve for posting and notification to all parties.

Dated: July 7, 2009

/s/ Ann M. St. Peter-Griffith
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